No. 2650

United States

Circuit Court of Appeals

For the Ninth Circuit.

LOUIS BUTTNER,

Appellant,

vs.

MARY A. ADAMS, ALLEN SHIPPING COMPANY, LEON BLUM, C. W. BRANDT, BYXBEE & CLARK COMPANY, J. M. COLMAN, HAVISIDE, WITHERS & DAVIS, E. HENRIX, D. B. HINCKLEY, EXCELSIOR INVESTMENT COMPANY, RUSS MILL AND LUMBER COMPANY, LAURA M. HUNTOON, C. A. HOOPER & COMPANY, S. G. JOHNSON, H. C. JENSEN, T. J. JORGENSEN, E. KALLENBERG, E. H. KITTREDGE, C. A. KLINKENBERG, OTTO LINDHOLM, ANNA MAAS, MARINE INVESTMENT COMPANY, C. F. MICHAELS, THE CHARLES NELSON COMPANY, A. A. BAXTER, A. E. COOLEY, S. C. DENSON, L. SEGELHORST, JAMES TYSON, CLARA PETERSON, F. B. PETERSON, OTTO PETERSON, F. L. PRITCHARD, D. ROTH, Z. RUSS & SONS COMPANY, AUSTIN SPERRY, H. B. SPERRY, KATE E. SPIERS, F. W. VOOGT, FRANCES J. WILSON, MABEL LOIS HODGE, THOMAS CARROLL HODGE, STELLA H. WAYMAN, FLORENCE E. WILLIAMS and AMELIA WETZEL YSCHUDI,

Appellees.

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Upon Appeal from the United States District Court for the Northern District of California, First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

In the District Court of the United States in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15, 720.

LOUIS BUTTNER,

Libelant,

vs.

MARY A. ADAMS ALLEN SHIPPING COMPANY, LEON BLUM, C. W. BRANDT, BYXBEE & CLARK COMPANY, J. M. COLMAN, HAVISIDE WITHERS & DAVIS, E. HENDRIX, D. B. HINCKLEY, EXCELSIOR INVESTMENT COMPANY, RUSS MILL and LUMBER COMPANY, LAURA M. HUNTOON, C. A. HOOPER & COMPANY, S. G. JONHSON, H. C. JENSEN, T. J. JORGENSEN, E. KALLEBERG, E. H. KITTREDGE, C. A. KLINKENBERG, OTTO LINDHOLM, ANNA MAAS, MARINE INVESTMENT COMPANY, C. F. MICHAELS, THE CHARLES NELSON COMPANY, A. A. BAXTER, A. E. COOLEY, S. C. DENSON, L. SIEGELHORST, JAMES TYSON, CLARA PETERSON, F. B. PETERSON, OTTO PETERSON, F. L. PRITCHARD, D. ROTH, Z. RUSS & SONS COMPANY, AUSTIN SPERRY, H. B. SPERRY, KATE E. SPIERS, F. W. VOOGT, FRANCES J. WILSON, MABEL LOIS HODGE,

THOMAS CARROLL HODGE, STELLA H. WAYMAN, FLORENCE E. WILLIAMS, and AMELIA WETZEL YSCHUDI,

Respondents.

(Amended Libel.)

To the Honorable M. T. DOOLING, Judge of the Above-entitled Court.

The libel of Louis Buttner of said district, formerly a seaman, now without permanent occupation by reason of the injuries hereinafter complained of, amended by leave of the Court first had and obtained, against the respondents above named all of said district, merchants and ship owners, in a cause of damages, civil and maritime, alleges as follows:

I.

That during the whole of the month of January, 1913, Pacific Shipping Company, was, ever since has been, and now is, a corporation organized and existing under and by virtue of the laws of the State of California, having its office and principal place of business [11*] in the city and county of San Francisco, said State, during said month of January, 1913, it was the owner and operator of a certain merchant sailing vessel flying the American flag, and having its home port, in the port of San Francisco, State of California, and known, named and called the "Americana."

II.

That under and by virtue of the laws of the State

*Page-number appearing at foot of page of original certified Record.

of California, to wit, section 3 of article XII of the Constitution of said State, and section 322 of the Civil Code of said State, each stockholder of a corporation organized under the laws of said State is individually and personally liable for such proportion of all of the debts and liabilities of a corporation in which he is a stockholder, contracted or incurred during the time he was a stockholder in such corporation, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation, and so liable during the whole of the month of January, 1913, ever since and now.

III.

That during the whole of said month of January, 1913, said Pacific Shipping Company had a total amount of shares of its capital stock subscribed in amount 4597 shares and respondents herein each owned the following number of shares thereof, to wit: Mary A. Adams, 106 shares, Allen Shipping Company, 61 shares, Leon Blum, 38 shares, C. W. Brandt, 17 shares, Byxbee & Clark Company, 32 shares, J. M. Colman, 4 shares, Haviside, Withers & Davis, 21 shares, E. Henrix, 19 shares, D. B. Hinckley, 8 shares, Excelsior Investment Company, 155 shares, Russ Mill and Lumber Company, 29 shares, [12] Laura M. Huntoon, 11 shares, C. A. Hooper & Company, 54 shares, S. G. Johnson, 2 and one-half shares, H. C. Jensen, 8 shares, T. J. Jorgensen, 3 shares, E. Kallenberg, 11 shares, E. H. Kittredge, 19 shares, C. A. Klinkenberg, 2 shares, Otto Lindholm, 12 shares, Anna Maas, 4 shares, Marine In-

vestment Company, 8 shares, C. F. Michaels, 40 shares, The Charles Nelson Company, 353½ shares, A. A. Baxter, 5 shares, A. E. Cooley, 5 shares, S. C. Denson, 5 shares, L. Segelhorst, 5 shares, James Tyson, 21 shares, Clara Peterson, 35 shares, F. B. Peterson, 11 shares, Otto Peterson, 21 shares, F. L. Pritchard, 128 shares, D. Roth, 53 shares, Z. Russ & Sons Company, 33 shares, Austin Sperry, 10 shares, H. B. Sperry, 10 shares, Kate E. Spiers, 8 shares, F. W. Voogt, 10 shares, Frances J. Wilson, 13 Shares, Mabel Lois Hodge 6½ shares, Thomas Carroll Hodge, 6½ shares, Stella H. Wayman, 4 shares, Florence E. Williams, 4 shares, and Amelia Wetzel Yschudi, 4 shares.

IV.

That on all of the dates and times herein mentioned, respondents Allen Shipping Company, Byxbee and Clark Company, Haviside, Withers & Davis, Excelsior Investment Compnay, Russ Mill and Lumber Company, C. A. Hooper and Company, Marine Investment Company, The Charles Nelson Company, and Z. Russ and Sons Company, were and now are corporations organized and existing under and by virtue of the laws of the State of California.

V.

That on the 28th day of January, 1913, said Pacific Shipping Company and libelant made executed and entered into each with the other a certain agreement in writing, in the form commonly known as shiping articles, at the city and county of San Francisco where the said vessel "Americana" then was, under and by which the said Pacific Shiping Com-

pany hired and employed libelant to serve as seaman on said [13] vessel for a voyage from said San Francisco to a place called Knapton in the State of Washington, and libelant in said agreement agreed so to serve at the wages of forty-five ($45) dollars per month, that said shipping articles were not signed before any United States Shipping Commissioner whatever, and thereafter and on the same day the said vessel with libelant on board thereof under said agreement left the said San Francisco on said voyage and thereafter safely arrived at the said place called Knapton.

VI.

That said Pacific Shipping Company negilently and carelessly sent the said vessel to sea from said San Francisco with libelant so on board on the day last above mentioned, in an unsafe and unseaworthy condition in this, that upon and as a necessary part of the equipment of said vessel, was a certain mechanical structure of contrivance called a windlass, it being used thereon in raising and lowering the anchors of said vessel of which there *was* two and it also being used in pulling in and letting out and securing said anchor and the anchor chains of said vessel; of which anchor chains there *was* also two, whenever it was necessary in the operation of said vessel so to do, and it also being used to hold the said anchor chains and prevent them from moving when a strain was placed on said anchor chains from any cause, there being at said times one anchor chain on the port side of said vessel and one on the starboard side thereof, there also being on said

windlass two chain sheaves one on each of said sides of said vessel, over which the said anchor chains led and *laid,* the said chain sheaves being so arranged that in the periphery of each of said chain sheaves were receptacles into which the links of said anchor chains fitted and locked, so that, the said sheaves being round and each of which were firmly keyed on to a shaft and fastened thereto **[14]** neither of said anchor chains could move unless the said sheaves, which were also called wildcats, unless the said sheaves and the shaft upon which they were so keyed and fastened revolved; that to prevent such shaft and said sheaves from revolving when the operation of the said vessel required that they should not revolve there was on all of said times fitted to, and keyed on to said shaft two contrivances called compressors, each of which compressors consisted of an iron brake wheel, and around each of said brake wheels there was placed an iron band which was firmly affixed to the frame of said windlass in such a manner that it could not rotate; that when it was desired to stop either of the said anchor chains from moving or both from moving the said iron bands were tightened around the said brake wheels by means of a screw on each of said bands which drew the said bands together, that is to say the ends of each of said bands together, and so tightened them around said brake wheels, and thus when the said brake wheels and bands around the same were in proper order and the said bands were tightened around said brake wheels, the said shaft and said chain sheaves and brake wheels were

unable to rotate and the said anchor chains were firmly held and prevented from moving; that when it became necessary in the operation of said vessel to by power rotate the said shaft and the said chain sheaves, the same was done by the power of a steam donkey-engine, the power of which donkey-engine was transmitted therefrom to another shaft also attached to and a part of said windlass upon which shaft there was a small cog wheel which intersected with another and larger cog wheel which was firmly fastened to the said shaft upon which the said chain sheaves and brake wheels were, the cogs of each of said cog wheels intersecting with each other and the power of said donkey-engine was transmitted to the said shaft upon which the smaller of [15] said cog wheels was so fixed by and through an endless iron chain called a messenger; that in order to prevent persons who were working on said windlass or near to the same from being caught in said cog wheels when the said cog wheels rotated, they always rotating when the shaft upon which the said chain sheaves were rotated, it was necessary for a for a guard to be placed covering said cog wheels, and the said windlass was unsafe and defective without such guard, but the said vessel was operated at said time without such guards or any guard whatever on said cog wheels or covering the same and there was nothing to prevent a person near such cog wheels from becoming entangled in said wheels at any time; that the said compressors on said brake wheels and said windlass were unsafe and defective at the time she was sent to sea as

aforesaid and continued to be unsafe up to the time libelant was injured as hereinafter mentioned in this, that the bands on said brake wheels were rusted and badly worn and would not perform the service for which they were placed upon said windlass, in that they would not nor would either or both thereof at any time stop the said chain sheaves from revolving when a strain was placed upon such anchor chains or either thereof although such compressors were placed there for that purpose, and said windlass was defective and unsafe if said compressors would not prevent said chain sheaves from revolving at all times when it was necessary in the operation of said vessel to stop them from revolving and there was no other method of stopping said chain sheaves from revolving, windlasses on vessels usually having a contrivance called pawls to also prevent such chain sheaves from revolving but there *was* no pawls on the said "Americana," or upon her windlass. **[16]**

That the said Pacific Shipping Company sent the said vessel to sea on the voyage aforesaid in tow of a steam vessel called the "Falcon" to be towed to the said Knapton thereby, the said "Falcon" towing the said "Americana" in the following manner to wit, by and through a hawser one end of which was fastened to the said "Falcon" and the other end of which was made fast to the port anchor chain of the said "Americana," the said anchor chain being led over and fitting into the receptacles on the chain sheave on the port side of said vessel and from thence through an aperture on the port

bow of said vessel called a hawse pipe, the end of said anchor chain then being fastened to the said hawser of said "Falcon," which was customary way of towing vesels such as the "Americana" then was, that when the said "Falcon" was so towing the said "Americana" said "Falcon" exerted strain upon the said hawser and anchor chain, but no more strain than the said windlass was designed to hold or would hold when in proper order, but by reason of the defective condition of said compressors as aforesaid they would not prevent the said shaft upon which said chain sheaves were so affixed from at intervals rotating when the said "Americana" was *so* being so towed as aforesaid, that after the said vessels had so left said San Francisco and proceeded up the coast of California to a point about one hundred and eighty miles north thereof and while upon the waters of the Pacific Ocean the said vessels then being in a swell which caused the said "Americana" to pitch to some extent, but not to an immoderate or unusual extent, the condition of the wind and sea being a usual and ordinary condition of the wind and sea at the place where the said vessels were at that time of the year, without the fault of anyone but wholly incident to ocean towing, the strain upon said anchor chain became and for a short time prior thereto had been irregular and at times the said chain sheaves rotated by reason of the said compressors being **[17]** unable by reason of their defective condition as aforesaid to stop them from rotating, that the master, mates and crew of said vessel, she having such in her service

at that time used every endeavor to stop such rotation by and through such compressors to stop such rotation and also by and through ropes *with they* tied the said anchor chain to posts on said *vessel stop* such rotation, it being necessary in the towing of said vessel so to do all to stop the said anchor chain by which the said vessel was so being towed from rendering out and to hold the same stationery but it was impossible by reason of the said defective condition of said compressors so to do.

That on the evening of the 29th day of January, 1913, while the said "Americana" was being towed as aforesaid and the said windlass was in the condition aforesaid libelant was ordered by the master of said vessel to go to the starboard side of said windlass to clear away some anchor chain that had accumulated there by reason of the said windlass having rotated as hereinbefore set forth, and while so engaged the said windlass by reason of its defective condition as aforesaid began to rotate without the knowledge or fault of libelant but by reason of the said compressors being unable to stop it from so doing when the strain of the towing of said vessel was thereon, and thereupon, by reason of such rotation, libelant's left hand and arm became caught between the cogs of said cog wheels where they intersected as hereinbefore described and his said left hand and arm were dragged into said cog wheels between the cogs thereof where said cogs so intersected and his said left hand and arm were badly crushed and it became necessary to cut his arm off to extricate him from said cogs and thereafter by

reason of his said injuries he was compelled to have his left arm amputated above the elbow, and he suffered great mental and physical pain and mental suffering and ever since and forever he will be prevented from following his occupation as a seaman, having been mate on vessels prior to his [18] said injuries, all by reason of the defective condition of the said windlass as aforesaid and the negligent and careless conduct of said Pacific Shipping Company in operating and sending the said "Americana" to sea on the voyage aforesaid and the inability of said compressors to stop the said windlass from rotating as aforesaid, that whenever the said windlass rotated it always caused the said cog wheels to rotate, all to the damage of the libelant in the sum of twenty-five thousand ($25,000) dollars.

VII.

That at the times aforesaid the said "Americana" had no cargo, was light and easily towed.

VIII.

That under and by virtue of the laws of the State of California, to wit, section 359 of the Code of Civil Procedure of said State, an action can be brought against a stockholder of a corporation to enforce a liability against such stockholder within the years after the liability is created; that libelant has not been guilty of laches in prosecuting this action for the reason that on the 3d day of April, 1913, at which time said Pacific Shipping *Company in* value largely in excess of any judgment he could recover against it for his said injuries, he filed a complaint

in the Superior Court of the State of California, in and for the city and county of San Francisco, praying for damages for his injuries aforesaid, that thereafter such proceedings were had in the action so commenced that on the 15th day of September, 1914, he recovered an action against said Pacific Shipping Company in such action for the sum of five thousand ($5,000) dollars damages and $88.10 costs, that prior to the recovery of such judgment said Pacific Shipping Company without the knowledge of libelant became bankrupt, without any property whatever, and it is now impossible to make said judgment or any part thereof, and none thereof has been paid. **[19]**

IX.

That during the whole of the month of January, 1913, under the laws of the State of California contributory negligence of an employee, if any would not bar a recovery for damages for personal injuries by an employee against an employer where the negligence of the employer was gross and that of the employee slight in comparison, but the damages could be diminished in proportion to the amount of negligence attributable to the employee, *now* was it nor is it a bar to such an action that the employee either expressly or impliedly assumed the risk of the hazard complained of, nor was it a bar to such an action that the injury complained of was caused in whole or in part by the want of ordinary care of a fellow servant.

X.

That all and singular the premises are true, and

within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore libelant prays that the respondents above named may be *requited* to answer under oath all and singular the premises aforesaid, that *that* this Honorable Court will be pleased to decree the payment of the damages aforesaid with costs, and that judgment *may entered* against said respondents therefor individually as the amount of the shares of capital stock owned by each thereof on the 29th day of January, 1913, bore to the whole of the subscribed capital stock of said corporation, and that he, the said libelant, may have such other and further relief in the premises as the Court is competent to give.

H. W. HUTTON,
Proctor for Libelant. [20]

United States of America,
Northern District of California,—ss.

Louis Buttner, being first duly sworn, deposes and says as follows:

I am the libelant above named. I have read the foregoing amended libel and I know the contents thereof, and the same is true of my own knowledge except as to the matters therein stated on information or belief and as to those matters I believe it to be true.

LOUIS BUTTNER.

Subscribed and sworn to before me this 5th day of December, 1914.

[Seal] L. H. ANDERSON,

Notary Public in and for the City and County of San Francisco, State of California.

Copy received this 5th day of December, 1914.

DENSON, COOLEY & DENSON,

Proctors for Respondents.

[Endorsed]: Filed Dec. 8, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [21]

[Title of Court and Cause.]

Exceptions to Amended Libel.

To the District Court of the United States, for the Northern District of California.

The exceptions of all the respondents to the amended libel and complaint of Louis Buttner against these respondents on file herein avers as follows:

I.

That the said amended libel does not state facts sufficient to constitute a cause of action.

II.

That libelant's alleged cause of action is not one of admiralty or maritime jurisdiction and cannot be prosecuted in this court, and that this court has no jurisdiction over the subject matter of said alleged cause of action.

III.

It appears from said libel that the libelant elected to bring suit in the Superior Court of the city and

county of San Francisco, State of California, and against Pacific Shipping Company, a corporation, and that he has procured judgment in said Superior Court against said corporation for an adequate amount as damages, notwithstanding which he is now endeavoring [22] to come into this Honorable Court of Admiralty jurisdiction to assert the same claim sued on in said Superior Court, and it appears that because of the said conduct and election of said libelant to submit himself and his cause of action to the jurisdiction of the Superior Court, his cause of action is not one of admiralty or maritime jurisdiction and cannot be prosecuted in this court.

IV.

That it appears from said libel or complaint that the cause of action attempted to be set up therein is barred by the provisions of subdivision 3 of section 340 of the Code of Civil Procedure of the State of California.

V.

That it appears from said libel or complaint that the cause of action and damages alleged therein is barred by the laches of the said libelant in delaying for more than a reasonable time the commencement of proceedings in this court and that libelant's excuse for his delay is inadequate and insufficient, for it appears that he elected to rely upon an action at law in the State Court and to prosecute an action against the Pacific Shipping Company alone, when he might have made the stockholders thereof parties defendant therein.

WHEREFORE, these respondents, and each of them, pray that they may be hence dismissed and that their costs and expenses may be decreed to them.

DENSON, COOLEY & DENSON,
Proctors for Respondents.

Service of the within Exceptions to Amended Libel and receipt of a copy thereof this 15th day of December, 1914, is hereby admitted.

H. W. HUTTON,
Proctor for Libelant.

[Endorsed]: Filed Dec. 15, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[23]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the court-room thereof, in the city and county of San Francisco, on Wednesday, the 27th day of January, in the year of our Lord, one thousand nine hundred and fifteen. Present: the Honorable, M. T. DOOLING, District Judge.

[Title of Court and Cause.]

[Order Sustaining Exceptions to Libel and Dismissing Libel.]

The Court this day filed opinion and ordered that the exceptions to the libel, heretofore filed and submitted herein, be, and the same are hereby, sustained and the libel dismissed. **[40]**

[Title of Court and Cause.]

(Opinion and Order Sustaining Exceptions to Libel and Dismissing Libel.)

H. W. HUTTON, Esq., Proctor for Libelant.

DENSON, COOLEY & DENSON, Proctors for Respondents.

In this action the libelant seeks to recover from the respondents, forty-five in number, the sum of $25,000 as damages for injuries received on January 29th, 1913, on the sailing vessel "Americana," alleged to have been the property of the Pacific Shipping Company, a California corporation. The respondents are alleged to have been stockholders in the said corporation at the time the injury was received, and the liability sought to be fixed upon them by this action is the stockholders' liability provided for in the constitution and Civil Code of California. This provision is as follows:

> "Each stockholder of a corporation is individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation."

The libel sets forth facts tending to show that the injuries were the result of the negligence of the corporation, and [41] that as the damages occasioned him was a liability of the corporation incurred while respondents were stockholders, re-

covery is sought against them. The libel discloses the further fact that libelant on April 3d, 1914, commenced an action in the Superior Court of California, in and for the city and county of San Francisco, against the said Pacific Shipping Company for the damages occasioned by this same injury, in which action on September 15th, 1914, he recovered judgment for the sum of $5,000 damages and $88.10 costs, which judgment he has been unable to satisfy because of the insolvent condition of the judgment debtor. The libel was filed in this court on October 21st, 1914, a month after the rendition of judgment by the State Court in favor of libelant and against the corporation.

Under the constitution provision respondents are liable only for the liabilities of the corporation incurred while they were stockholders. This action is for $25,000, but it has already been judicially determined by a court of libelant's own selection, and which had full jurisdiction of the parties and the subject matter, that the liability of the corporation itself was only $5,000. The liability of respondents, therefore, cannot in any event exceed that sum. It is quite true that libelant was under no obligation to proceed against the corporation as a condition precedent to his right of action against respondents in this court, if such existed, but having selected his tribunal, and recovered a judgment in the common law courts of the State, he cannot now be permitted to endeavor to enforce that judgment by suit in this court. But the judgment is now the measure of respondents' liability, and if this action

were permitted to proceed at all it could proceed only for the amount of the judgment. This being so the action cannot be regarded as a suit on the original and indefinite claim for damages, which was of a maritime nature, but in reality as an [42] action on a judgment not of a maritime character. The libelant having selected the State tribunal to fix the liability, should be relegated to the State tribunals to enforce it.

The exceptions to the libel are therefore sustained, and the libel dismissed.

January 27th, 1915.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jan. 27, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [43]

[Title of Court and Cause.]

Petition for a Rehearing.

Libelant above named respectfully petitions the above-entitled court, and the Judge thereof for a rehearing and a reconsideration of the points involved on the exceptions to his libel herein, and offers the following as reasons therefor.

I.

As we understand the Court's opinion herein it is that the liability of the corporation being fixed by a judgment, the original liability has become merged in the judgment, and only an action on the judgment will lie against the stockholders, and it follows of course, that this court has no jurisdiction

over a cause of action on the judgment.

II.

We admit that is the law under some statutes, but it is not the law under the California constitution and statutes, and the decisions of the United States and State Courts are uniform to the contrary as follows: **[44]**

In the case of Thomas vs. Mathieson, 232 U. S. 222 the United States Supreme Court says on page 236, having occasion to consider Section 322, of the California Civil Code, says:

> "The Defendant was a principal debtor, Hyman vs. Coleman, 82 Cal. 650."

In the Hyman vs. Coleman so approved by the United States Supreme Court, we find the following on page 653.

> "It is settled law in this state that, under our constitution and statutes, each stockholder of a corporation is liable for his proportion of the corporate debts contracted while he was a stockholder, *as a principal debtor, and not as a surety. Cases cited.*
>
> The liability commences and a right of action accrues against the stockholders at the same time.
>
> Suspension of the remedy against the corporation does not suspend the remedy against *or affect the liability of the stockholders.*

In the case of Young vs. Rosenbaum, 39 Cal. 646, a judgment against the corporation was pleaded This case was cited in the brief in Dolbear v. Foreign Investment Co., 196 Fed. 646, cited by libelant on the

argument. The Supreme Court of the State of California says on page 654.

> "Had the judgment been proven, it would not have constituted a bar to the action. The stockholders are not sureties of the corporation, but are principal debtors. *A judgment* against the corporation does not extinguish or suspend the liability of the stockholders, *and it clearly does not merge it.* The remedy against the corporation may, for some cause be suspended, or, perhaps, barred without impairing the remedy against the stockholders, because the liability of the latter is primary, and is conditional or contingent only in this; that there must be a subsisting debt against the corporation. When a debt accrues against the corporation, it also accrues against the stockholders and they remain such debtors until the debt is paid or satisfied.

The Supreme Court was dealing with a debt at that time, but the rule would be identical if it was a liability, as both are covered by the same language in the constitution or law.

In the case of Herman vs. Hecht, 116 Cal. 553, the Supreme Court of California, says on page 561: [45]

> "The Court also erred in admitting evidence that the plaintiff had sued the corporation and caused a writ of attachment to issue, and that said action was still pending. *That fact constituted no defense to plaintiff's action;* but if it did, it was not pleaded, and therefore not available to the defendants.

In the case of Nielson vs. Crawford, 52 Cal. 248, the same Court says on page 249,

> "If an admission of indebtedness, made by a corporation, be evidence of indebtedness in an action against a stockholder, it is no*r* perceived * * * for instance, *a judgment rendered*—should not equal*ly* estop a stockholder to deny the fact of indebtedness in an action brought against him to enforce his proportionate liability. It is well settled here that the liability of the stockholder *is not derivative nor secondary, but is of a primary* and wholly independent character, and the indebtedness for which he is to be held cannot be shown by entries made by the employees of the corporation, over which he has no supervision, and can exercise no control.

In the case of Winona Wagon Co. v. Bull, 108 Cal. 1, the same Court says on page 5.

> "The complaint bases the right to recover on the making of the note *and the judgment against the corporation;* but, as the liability of the stockholder is a separate and independent one, commencing with and dependent upon the original indebtedness, it is doubtful if the averments of the complaint in the case at bar are sufficient (quoting from Hunt vs. Ward, 99 Cal. 612.)"

In the same case that is in 108 Cal., the same Court further says on page 6, quoting from Trippe v. Huncheon, 82 Ind. 307, where an action had been brought against stockholders on a judgment obtained against the corporation.

"* * * It is upon this obligation that the creditor who seeks to charge the members of the corporation as individuals must sue—*not upon a judgment* obtained against the corporation."

In the recent case of Johnson vs. Breneger et al., No. 15,645, Second Division of this court, his Honor Judge Van Fleet recently held, that the liability of a stockholder *was primary,* and not secondary, and that it dated back to the origin of the liability sought to be enforced. [46]

II.

A PARTY SEEKING TO ENFORCE A STOCKHOLDER'S LIABILITY HAS A RIGHT TO SUE IN ANY COURT HAVING JURISDICTION.

The United States Supreme Court in Flash vs. Conn, 109 U. S. 371 says:

"The right of the plaintiff to sue upon the liability in any Court having jurisdiction is therefore clear, Dennich vs. Railroad Co., 103 U. S. 11."

See, also, Whitman vs. Oxford Bank, 176 U. S. 565; Huntington vs. Attroll, 146 Id. 657; Selig vs. Hamilton, 234 Id. 652.

And the case of Dolbear vs. Foreign Mines Investment Co. 196, Fed. 646, decided by the Circuit Court of Appeals for this Circuit and cited on the argument.

III.

THE LIABILITY OF A STOCKHOLDER DEPENDS ENTIRELY UPON THE STATUTES, etc.

In some State the statute law makes the liability dependent upon the obtaining of a judgment, in others only a trustee can sue, in some a judgment against the corporation is conclusive against the stockholders.

Hancock vs. National Bank, 176 U. S. 640.

However the decisions of the courts of last resort, both Federal and State, are that under the laws of California, a person seeking to enforce the liability *of stockholder,* must sue on *the original liability alone,* and he cannot sue on a judgment, or on an obligation given by the corporation.

In this case suppose libelant had not obtained judgment for five years, he could not have recovered against the stockholders at all, if he had to sue on the judgment as the statute runs against them in three years. **[47]**

In conclusion we beg to state, that the United States Supreme Court once said in case not necessary to cite, that the growing tendency in American business affairs was to carry on business as corporations to escape personally liability, and it was for that reason the different States had passed their several statutes, and such statutes should be enforced in all proper cases.

We respectfully ask for a rehearing, and further argument on the exceptions if the Court shall deem it necessary.

Respectfully,

H. W. HUTTON,

Proctor for Libelant.

[Endorsed]: Filed Feb. 24th, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [48]

[Title of Court and Cause.]

Reply to Petition for Rehearing.

As is stated in the opening paragraphs of libelant's petition for rehearing, counsel is asking simply for a "reconsideration of the points involved on the exceptions to his libel herein"

This matter was argued very thoroughly in open court on the hearing of the exceptions to the libel and authorities were cited at length at that time. The matter has been fully considered, and if libelant is dissatisfied with the decision of this Court he has his remedy in an appeal therefrom. As was said by Mr. Justice Field, in Giant P. Co. vs. Cal. V. P. Co., 5 Fed., at page 201,

> "A new hearing should not be had simply to allow a rehashing of old arguments."

Mr. Justice Story voiced the same view in Jenkins v. Eldridge, 3 Story, at 305, when he said,

> "If rehearings are to be had until the counsel on both sides are entirely satisfied, I fear that suits would become immoral, and the decision be postponed indefinitely." [49]

We quote from Foster's Federal Practise (5th ed.), page 1396, as follows:

> "Unless the Judge acts of his own motion, a rehearing will be granted only for errors of law apparent upon the record and arising upon

questions which *were not argued at the original hearing,* or upon new discovered evidence of such a character that it would have authorized a new trial in the action at law." (Citing cases.)

Counsel presents no new reasons in support of his libel. The points are the same as those made at the argument upon the exceptions. We do not differ with him as to the law stated in the cases cited in the petition for rehearing, but we do contend that they are inapplicable to the questions at bar, and do not in *any weaken* the decision of this Court on the exceptions.

The liability of the stockholders is a liability created by law, as stated in the cases cited by counsel, and is a primary obligation. But the weakness of counsel's position lies in the fact that he has overlooked the proposition that the stockholders are liable only for the debts of the corporation, and that the debt of the corporation in this instance became a fixed amount when, and only when, the State Court rendered a judgment against it for the sum of $5,000. There can be no question that the libelant might have sued the stockholders originally, either with or without joining the corporation, for any amount that he might choose to name, and that in such action the liability could be fixed and determined by any Court of competent jurisdiction. He, however, elected to have the State Court fix and determine the amount of that liability in an action brought against the corporation and is of necessity bound by that determination. The original action

was one for tort. The tort was not committed by the stockholders but by the corporation [50] itself, acting through its agents, and the State Court has found that the corporation is liable for that tort, in the sum of $5,000. This Court cannot be asked at this time to retry a matter originally tried in the State Court.

See Hyatt v. Challiss, 55 Fed. 267;
Bailey v. Willeford, 126 Fed. 803;
Forsyth v. Hammond, 156 U. S. 507, 41 L. Ed., page 1095.

This is an action to recover upon a statutory liability and is not an action in tort.

See Pacific Surety Co. v. L. & S. T. & W. Co., 151 Fed. 440,
Morrow v. Superior Court, 64 Cal. 383.

We shall not go into a lengthy discussion of this matter for the reasons, as above stated, that it was thoroughly presented in all its aspects by respective counsel on the first hearing.

We respectfully submit that the petition for rehearing should be denied.

A. E. COOLEY,
Proctor for Respondents.

[Endorsed]: Filed Feb. 25th, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [51]

[Order Denying Petition for a Rehearing and Dismissing Cross-libel.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the court-room thereof, in the city and county of San Francisco, on Thursday, the 27th day of May, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable M. T. DOOLING, District Judge.

[Title of Court and Cause.]

In this cause the Court ordered that libelant's petition for rehearing be, and the same is hereby, denied. Further ordered that in view of respondents having procured the dismissal of the libel herein, that their cross-libel be, and the same is hereby, likewise dismissed. [52]

[Order Denying Petition for Rehearing and Dismissing Cross-libel.]

[Title of Court and Cause.]

H. W. HUTTON, Esq., Proctor for Libelant.

DENSON, COOLEY & DENSON, Proctors for Respondents.

Libelant's petition for rehearing is denied.

Respondents having procured the dismissal of the libel herein, their cross-libel will also be dismissed.

May 27, 1915.

M. T. DOOLING,
Judge.

[Endorsed]: Filed May 27, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [53]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY.

LOUIS BUTTNER,

Libelant,

vs.

MARY C. ADAMS et al.,

Respondents.

Final Decree.

For the reasons stated in the opinions on file in the above cause the libel and cross-libel herein are each dismissed.

Dated June 7, 1915.

M. T. DOOLING,
Judge.

Entered in Vol. 6, Judg. and Decrees, at Page 285.

[Endorsed]: Filed Jun. 7, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [54]

[Title of Court and Cause.]

(Notice of Appeal.)

The respondents in the above-entitled cause and their proctors will please take notice, that libelant above named hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree in said cause, the said decree hav-

ing been given and made therein and being dated the 7th day of June, 1915, and from the whole of said decree.

Dated July 24th, 1915.

H. W. HUTTON,
Proctor for Appellant and Said Libelant.

Copy received this 24th day of July, 1915.

DENSON, COOLEY & DENSON,
Proctors for Respondents.

[Endorsed]: Filed Jul. 24, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [55]

[Title of Court and Cause.]

Assignment of Errors.

1st. The Court erred in dismissing libelant's libel.

2d. The Court erred in denying libelant's petition for a rehearing.

3d. The Court erred in finding and deciding that libelant's libel was filed to enforce the judgment recovered by him in the Superior Court of the city and county of San Francisco.

4th. The Court erred in finding and deciding that the said judgment so obtained by libelant was the measure of respondents' liability.

5th. The Court erred in finding and deciding that libelant could only proceed against respondents for the amount of the judgment obtained against Pacific Shipping Company by libelant in the Superior Court of the city and county of San Francisco.

6th. The Court erred in finding and deciding that libelant's libel could only be regarded as a suit on

the judgment and not on the original claim for damages.

7th. The Court erred in finding and deciding that libelant having brought a suit against Pacific Shipping Company in a State court he [56] should be relegated to such court to enforce the judgment there obtained by him.

8th. The Court erred in finding and deciding that the judgment obtained by libelant against Pacific Shipping Company in the Superior Court of the city and county of San Francisco, State of California, in any way affected his right to sue the stockholders of said Pacific *Shipping on* the original liability.

9th. The Court erred in considering the judgment obtained by libelant against Pacific Shipping Company in any way whatever herein excepting in so far as showing that libelant had not been guilty of laches in suing the stockholders of said Pacific Shipping Company, the said judgment not being a final judgment nor having become final when the libel was filed nor has it become final since.

H. W. HUTTON,
Proctor for Libelant.

Copy received this 5th day of August, 1915.
DENSON, COOLEY & DENSON,
Proctors for Respondents.

[Endorsed]: Filed Aug, 5, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [57]

[Endorsed]: No. 2650. United States Circuit Court of Appeals for the Ninth Circuit. Louis

Buttner, Appellant, vs. Mary A. Adams, Allen Shipping Company, Leon Blum, C. W. Brandt, Byxbee & Clark Company, J. M. Colman, Haviside, Withers & Davis, E. Henrix, D. B. Hinckley, Excelsior Investment Company, Russ Mill and Lumber Company, Laura M. Huntoon, C. A. Hooper & Company, S. G. Johnson, H. C. Jensen, T. J. Jorgensen, E. Kallenberg, E. H. Kittredge, C. A. Klinkenberg, Otto Lindholm, Anna Maas, Marine Investment Company, C. F. Michaels, The Charles Nelson Co., A. A. Baxter, A. E. Cooley, S. C. Denson, L. Segelhorst, James Tyson, Clara Peterson, F. B. Peterson, Otto Peterson, F. L. Pritchard, D. Roth, Z. Russ & Sons Company, Austin Sperry, H. B. Sperry, Kate E. Spiers, F. W. Voogt, Frances J. Wilson, Mabel Lois Hodge, Thomas Carroll Hodge, Stella H. Wayman, Florence E. Williams and Amelia Wetzel Yschudi, Appellees. Apostles on Appeal. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Filed September 7, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

[Designation of Appellant as to Printing Record.]

In the United States Circuit Court of Appeals for the Ninth Circuit.

LOUIS BUTTNER,

Libelant and Appellant,

vs.

MARY A. ADAMS et al.,

Defendants and Appellees.

The appellant above-named intends to rely upon all of the errors assigned in his assignment or errors herein on this appeal, and designates the following parts of the record which he thinks necessary of the consideration thereof by the Appellate Court, to wit:

The amended libel.

The exceptions to the amended libel.

The order sustaining the exceptions to the amended libel and the opinion of the Court thereon.

The petition for a rehearing, and the answer to the petition for a rehearing.

The order denying petition for a rehearing.

The decree of the Court and the notice of appeal.

Insert the names of all of the parties in the first paper printed, and all subsequent papers, omit the title of the court and caption and print in place thereof the following: (Title of Court and Cause.).

Dated September 7th, 1915.

H. W. HUTTON,

Proctor for Appellant.

[Endorsed]: No. 2650. In the United States Circuit Court of Appeals for the Ninth Circuit. Louis Buttner, Libelant and Appellant, vs. Mary A. Adams et al., Defendants and Appellees. Designation of Parts of Record Necessary to Print. Copy Received this 7th day of September, 1915. Denson, Cooley & Denson, Proctors for Appellees. Filed Sep. 7, 1915. F. D. Monckton, Clerk.